IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH.

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FAO NO. 2645 OF 2007.

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Sat Pal Sharma son of Baldev Ram, resident of Village Massingan, Tehsil and District Patiala.

Versus

Jai Kishan son of Late Siri Ram, resident of Village Massingan, Tehsil & District Patiala and others.

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Before: Hon'ble Mr. Justice R.S.Madan.

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Present: Shri Sarjit Singh, Senior Advocate, with Shri Vikas Singh, Advocate, for the appellant.

Shri R.S.Sihota, Senior Advocate, with Shri Ishar Singh, Advocate, for the respondents.

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R.S.Madan, J

The core question which was raised by Jai Kishan, the defeated candidate before the Election Tribunal was whether after the missing of 28 votes from the ballot boxes at the time of counting of votes which was done on 29.6.2006, the declaration of Shri Sat Pal as elected Sarpanch, was in violation of Section 67 of the provisions of Punjab State Election Commission Act, 1994 (hereinafter for brevity to be referred to as the “Act”.

The aggrieved candidate filed election petition before Tribunal, who after hearing the learned counsel for the parties, vide orders dated 26.07.2006 and August 30, 2006 ordered recount of the votes in the presence of the parties. In the recount which was done on August 30, 2006, Jai Kishan was found to have secured 270 votes whereas Sat Pal

Sharma, the winning candidate, secured 249 votes. Further 28 votes were found to be missing from the ballot boxes. As a consequence of recount, the election of Sat Pal Sharma, as Sarpanch of Village Massingan, which was held on 29.06.2006 was set aside and the election petition filed by Jai Kishan was accepted.

Aggrieved by the order dated September 06, 2006 passed by the Tribunal, Patiala, Sat Parkash Sharma filed appeal before this Court, which was heard by Hon'ble Mr. Justice T.P.S.Mann and vide order dated May 29, 2007 the matter was remanded back to the Tribunal, Patiala with a direction to give finding on the fact whether on account of missing of votes, the result of the election had been materially affected or not, as provided in Section 67 of the Act, 1994.

The Tribunal after the receipt of the remand order and hearing learned counsel for the parties, vide order dated June 19, 2007, returned the finding in favour of Jai Kishan, the defeated candidate. As a result the election of Sat Pal Sharma, as Sarpanch of Village Massingan, was set aside.

Feeling dis-satisfied with the order dated June 19, 2007 passed by the Tribunal, Sat Pal Sharma, the appellant, has again knocked the door of this Court by filing FAO No. 2645 of 2007.

I have heard the learned counsel for the parties and have carefully gone through the material brought on the record.

Before dealing with the matter, it is pertinent to have the bare reading of Section 67 of the Act, 1994, which reads as under:-

> “Destruction, loss etc, of ballot papers at the time of counting. (1) If at any time before the counting of votes is completed, any ballot papers used at a polling station or at a place fixed for the poll are unlawfully taken out of the custody of the Returning Officer or are accidentally

> or intentionally destroyed or lost or are damaged or tampered with, to such an extent that the result of the poll at that polling station or place cannot be ascertained, the Returning Officer shall forthwith report the matter to the Election Commission".

Thus from the bare reading of the Section itself, it is clear that if at any time before the counting of votes is completed, the ballot papers are unlawfully taken out of the custody of the Returning Officer or are destroyed, lost or damaged to such an extent that result of the poll cannot be ascertained, the Returning Officer shall forthwith report to the ***Commission*** and the ***Commission*** shall either direct a fresh poll or direct the Returning Officer to resume and complete the counting.

The learned counsel for the appellant contended that the the Tribunal should not have interfered in the result of the election and should have allowed the election to stand. In support of his contention, he placed reliance on **Vashist Narain Sharma** Versus **Dev Chandra and others**- AIR 1954 Supreme Court 513(1) wherein it was observed as under:-

> "It cannot be held that the mere fact that the wasted votes are greater than the margin of votes between the returned candidate and the candidate securing the next highest number of votes must lead to the necessary inference that the result of the election has been materially affected. This is a matter which has to be proved and the onus of proving it lies upon the petitioner. Should the petitioner fail to adduce satisfactory evidence to enable the Court to find in his favour on this point, the inevitable result would be that the Tribunal would not interfere in his favour and would

allow the election to stand".

The learned counsel for the appellant further contended that at the time of counting of votes by the Presiding Officer on 29.06.2006 itself, Sat Pal Sharma was declared elected as he secured 8 votes more than the defeated candidate and as such he was rightly declared as elected by the Presiding Officer.

The submission made by the counsel for the appellant is of no force because in the present case, the question of missing votes is there which resulted into violation of Section 67 of the Act.

In support of his contention, the learned counsel for the respondent has placed reliance on AIR 1959 All 264(273) DB, wherein it has been observed as under:-

> "In a case coming under S. 100(1)(b) it is not necessary to prove that the result of the election has been materially affected by commission of corrupt practice by any person whatsoever. If corrupt practice has been committed by any person other than those mentioned in S.100(1)(b), election is to be declared void only if commission of corrupt practice has materially affected result of election".

The learned counsel for the respondent further placed reliance on the decision of the Supreme Court reported as AIR 1976 SC 1187, AIR 1969 SC 1201 and AIR 1965 Madh.Pra 55 (56) (DB).

The learned counsel for the respondent further contended that as per the recount which was ordered to be done on 30.8.2006 by the Tribunal, it was found that Sat Pal Sharma has secured 249 votes whereas Jai Kishan secured 270 votes. It was at this time that the Tribunal found missing of 28 votes from the ballot boxes. As a consequence of that recount, the election petition filed by Jai Kishan, the defeated candidate,

was allowed and the election was set aside.

Further more from the bare reading of Section 67 ibid shows that it was the duty of the Returning Officer, when he came to know about the missing of votes from the ballot boxes, to report the matter to the Election Tribunal instead of declaring the result.

The judgment relied upon by the counsel for the appellant in case Vashist Narain Sharma Versus Dev Chandra and others- AIR 1954 Supreme Court 513(1) is not attracted to the facts of the present case because in that case the number of votes wasted were more than the margin of votes between the returned candidate and the candidate securing the next highest number of votes and were not missing votes. Whereas, in the present case 28 votes were found to be missing and the Returning Officer failed to report the matter to the Election Commission, which amounts to violation of Section 67 of the Act ibid.

Thus after analyzing the facts and circumstances of the case from all the four corners, as also keeping in view the case law cited by the counsel for the respondents, I am of the considered view that the finding returned by the Election Tribunal, vide order dated June 19, 2007, calls for no interference.

As a result, the appeal filed by the appellant being devoid of merit, is hereby dismissed, with no order as to costs, as the parties had been frequenting for justice from one place to another.

(R.S.Madan)
Judge

August 27 , 2007.
Malik